

-----Original Message-----

From: Austin Schlick <[Austin.Schlick@fcc.gov](mailto:Austin.Schlick@fcc.gov)>  
To: 'ajdmm@optonline.net' <[ajdmm@optonline.net](mailto:ajdmm@optonline.net)>  
CC: John Ingle <[John.Ingle@fcc.gov](mailto:John.Ingle@fcc.gov)>  
Sent: Thu Jul 14 14:57:26 2005  
Subject: Re: Statute of Limitations Questions...

**You can define the issue on which you seek a Commission ruling.**

-----Original Message-----

From: Al <[ajdmm@optonline.net](mailto:ajdmm@optonline.net)>  
To: Austin Schlick <[Austin.Schlick@fcc.gov](mailto:Austin.Schlick@fcc.gov)>  
CC: John Ingle <[John.Ingle@fcc.gov](mailto:John.Ingle@fcc.gov)>  
Sent: Thu Jul 14 14:53:27 2005  
Subject: Re: Statute of Limitations Questions...

Can you have a Declaratory Ruling on "only" the limited issue of statute of limitations or do you have to plead the entire issue?  
Thanks!

Al

----- Original Message -----

From: "Austin Schlick" <[Austin.Schlick@fcc.gov](mailto:Austin.Schlick@fcc.gov)>  
To: <[ajdmm@optonline.net](mailto:ajdmm@optonline.net)>  
Cc: "John Ingle" <[John.Ingle@fcc.gov](mailto:John.Ingle@fcc.gov)>  
Sent: Thursday, July 14, 2005 2:42 PM  
Subject: Re: Statute of Limitations Questions...

The short answer to your question is no -- you cannot obtain a Commission "decision" without **following the procedures for declaratory rulings**, etc, that I previously have identified for you in connection with your NJ case. The Enforcement Bureau's website on [www.fcc.gov](http://www.fcc.gov) would be the place to start if you are interested in seeking a Commission ruling.



Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Petition for Declaratory Ruling on the	)	
Assignment of Accounts (Traffic) Without the	)	
Associated CSTP II Plans Under AT&T Tariff	)	
F.C.C. No. 2	)	
	)	
On Referral by the United States Court of Appeals	)	Internal File No. CCB/CPD 96-20
for the Third Circuit	)	
	)	
Combined Companies, Inc.	)	
and	)	
Winback & Conserve Program, Inc.,	)	
One Stop Financial, Inc.,	)	
Group Discounts, Inc.,	)	
800 Discounts, Inc.,	)	
	)	
Petitioners,	)	
	)	
and	)	
	)	
AT&T Corp.,	)	
	)	
Respondent.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 14, 2003**

**Released: October 17, 2003**

By the Commission:

**I. INTRODUCTION**

1. This Memorandum Opinion and Order addresses the Joint Petition for Declaratory Ruling filed by Petitioners Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc. (the Inga Companies) and Combined Companies, Inc. (collectively Petitioners). Petitioners' requests for declaratory relief stem from a question referred to us, under the doctrine of primary jurisdiction, by the United States Court of Appeals for the Third Circuit.<sup>1</sup> The question referred by the Third Circuit is "whether section 2.1.8 [of AT&T's Tariff FCC No. 2] permits an aggregator to

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<sup>1</sup> *Combined Co., Inc., Winback and Conserve Program, Inc., One Stop Fin. Inc., 800 Discounts, Inc., and Group Discounts, Inc. v. AT&T Corp.*, No. 96-5185 (3d Cir. filed May 31, 1996)(*Third Circuit Opinion*); see also *Combined Companies, Inc., et al. v. AT&T Corp.*, Civil Action No. 95-908 (D.N.J. filed May 19, 1995)(*First District Court Opinion*); *Combined Companies, Inc., et al. v. AT&T Corp.*, Civil Action No. 95-908 (D.N.J. filed Mar. 5, 1996)(*Second District Court Opinion*).

transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction.”<sup>2</sup> Interpretation of AT&T’s tariff is a matter within this agency’s expertise.<sup>3</sup> We conclude that AT&T’s tariff did not prohibit such a movement of traffic and thus permitted it. Accordingly, AT&T’s conduct was unauthorized and violated section 203 of the Communications Act. We explain our conclusions below.

## II. BACKGROUND

2. AT&T is a telecommunications carrier regulated under Title II of the Communications Act of 1934, as amended (the Act). At the time these events occurred, AT&T was a dominant provider of interstate telecommunications services and, as such, offered the services at issue under tariffs, which it filed with the Commission pursuant to section 203 of the Act.<sup>4</sup> The Inga Companies were non-facilities-based aggregator/resellers of AT&T’s inbound 800 Wide Area Telecommunications Service (WATS).<sup>5</sup> Prior to June 17, 1994, the Inga Companies completed and signed AT&T’s “Network Services Commitment Form” for WATS under AT&T’s Customer Specific Term Plan II (CSTP II), a tariffed plan, which offered volume discounts off AT&T’s regular tariffed rates.<sup>6</sup> The CSTP II was set forth in AT&T’s Tariff FCC No. 2 (Tariff).<sup>7</sup> The Inga Companies committed to aggregate \$54 million worth of 800 services per year under their nine CSTP II plans.<sup>8</sup> This volume of traffic qualified for a discount of 28 percent off AT&T’s regular tariffed rates – a 23 percent discount under the CSTP II plan, combined with an additional 5 percent discount available under the tariffed Revenue Volume Pricing Plan (RVPP).<sup>9</sup> The Inga Companies resold their AT&T’s WATS service at a discount off AT&T’s tariffed rates to third-party end-users, generally smaller business customers using 800 lines, which could not qualify individually for volume discounts.<sup>10</sup> These small businesses were the Inga Companies’ customers.<sup>11</sup> The Inga Companies aggregated these end-users’ 800 traffic under the CSTP II/RVPP.<sup>12</sup>

<sup>2</sup> See *Third Circuit Opinion* at 3 (quoting *First District Court Opinion* at 15).

<sup>3</sup> See *Bell Atlantic-Delaware, Inc., et al. v. Global Naps, Inc.*, File No. E-99-22-R, Order on Reconsideration, 15 FCC Rcd 5997, 6005, para. 22 & n.55 (2000)(and cases cited therein); *rev. denied*, 247 F.3d 252 (D.C. Cir. 2001), *cert denied*, 534 U.S. 1079 (2002).

<sup>4</sup> See *First District Court Opinion* at 2 n.2. Subsection 203(a) of the Communications Act requires every common carrier to file with the Commission “schedules,” *i.e.*, tariffs, “showing all charges” and “showing the classifications, practices, and regulations affecting such charges.” 47 U.S.C. § 203(a).

<sup>5</sup> See *Third Circuit Opinion* at 2; *First District Court Opinion* at 3.

<sup>6</sup> Joint Petition for Declaratory Ruling, Internal File No. CCB/CPD 96-20 (filed July 15, 1996) (Petition) at 9; see Comments of AT&T Corp. in Opposition to Joint Petition for Declaratory Ruling and Joint Motion for Expedited Consideration, CCB/CPD 96-20 (filed Aug. 26, 1996) (Opposition) at 4; *First District Court Opinion* at 3-4.

<sup>7</sup> *First District Court Opinion* at 3; see generally AT&T Corp. Further Comments, CCB/CPD 96-20 (filed Apr. 2, 2003) (AT&T Further Comments) at Attachment 1 (AT&T Tariff FCC No. 2 at § 3.3.1.Q. (AT&T 800 Customer Specific Term Plan II), 18<sup>th</sup> rev. p. 61.16 (eff. Dec. 12, 1994), 6<sup>th</sup> rev. p. 61.16.1 (eff. Mar. 11, 1994), 12<sup>th</sup> rev. p. 61.17 (eff. Mar. 11, 1994)).

<sup>8</sup> See *First District Court Opinion* at 7, 8 n.8; cf. Petition at 11 (Inga Companies committed to a volume of \$4 million per month).

<sup>9</sup> See *First District Court Opinion* at 3-5.

<sup>10</sup> *First District Court Opinion* at 3-4.

<sup>11</sup> See *First District Court Opinion* at 3; AT&T Further Comments at 6-10 (citing, *inter alia*, *AT&T Corp. v. Winback and Conserve Program, Inc.*, File No. E-97-02, Memorandum Opinion and Order, 16 FCC Rcd 16074, 16075, para. 3 (2001)).

<sup>12</sup> *First District Court Opinion* at 3-4.

3. Section 2.1.8 of AT&T's Tariff FCC No. 2 provided for the transfer or assignment of tariff plans.<sup>13</sup> In December 1994, the Inga Companies and CCI, a new or previously inactive company,<sup>14</sup> executed certain Transfer of Service Agreement and Notification (TSA) forms transferring the nine Inga Company CSTP II/RVPP plans to CCI.<sup>15</sup> They requested that AT&T permit the transfer of these plans to CCI.<sup>16</sup> Although AT&T initially refused to accept the transfer unless CCI provided a deposit of \$13,540,000,<sup>17</sup> the transfer ultimately was effected without a deposit, under a May 1995 order of the United States District Court for the District of New Jersey.<sup>18</sup> Thus, CCI was the legitimate transferee of the Inga Companies' CSTP II/RVPP plans and customer of AT&T.<sup>19</sup>

4. AT&T sold inbound and outbound services under Contract Tariff 516 (CT 516) to PSE, an aggregator/reseller unrelated to either the Inga Companies or CCI.<sup>20</sup> With an annual commitment of \$4 million, which included 15 million minutes of 800 services per year, the CT 516 discount available to PSE was 66 percent off AT&T's regular tariffed rates.<sup>21</sup> CCI wanted the CT 516 discount, which was significantly larger than that available under its CSTP II/RVPP plans. Accordingly, CCI and PSE jointly executed and submitted to AT&T nine TSA forms for each of the nine plans.<sup>22</sup> At the bottom of each TSA, in handwriting, these parties directed AT&T to move the "traffic only" on each plan to PSE.<sup>23</sup> The January 13 letter, under which these nine TSAs were forwarded, directs AT&T to "move the locations associated with these plans [but] not ... in any way to discontinue the plans."<sup>24</sup> In this way, CCI and PSE attempted to move to PSE the end-user traffic associated with each of the nine CSI CSTP II/RVPP plans, but not to move the actual plans themselves.<sup>25</sup> Having refused to recognize the original transfer from the

<sup>13</sup> *First District Court Opinion* at 6; see Exhibit I to Petition (AT&T Tariff FCC No. 2 at § 2.1.8 (Transfer or Assignment), 14<sup>th</sup> rev. p. 20 (eff. Apr. 21, 1994)).

<sup>14</sup> *First District Court Opinion* at 7-8 & n.6; Opposition at 4.

<sup>15</sup> See *First District Court Opinion* at 7.

<sup>16</sup> See *First District Court Opinion* at 7.

<sup>17</sup> *First District Court Opinion* at 7. This constituted one quarter of the companies' annual revenue commitment. *Id.* at 8.

<sup>18</sup> *Combined Companies, Inc., etc. and Winback & Conserve Program, Inc., et al. v. AT&T Corp.*, Civil Action No. 95-908, Preliminary Injunction (filed May 19, 1995) (*First Preliminary Injunction*); see generally *First District Court Opinion*. The district court found that section 2.1.8 of AT&T's tariff, which governed the transfer of plans, was not conditioned upon the provision of a deposit and that the Inga Companies had otherwise met the requirements of section 2.1.8. See *First District Court Opinion* at 20-21; accord 47 C.F.R. § 61.54(j)(1994)(special rules affecting a particular item must be specifically referred to in connection with such item).

<sup>19</sup> Because the district court ultimately found that AT&T's refusal to accept the transfer from the Inga Companies to CCI was improper and ordered AT&T to accept it, we assume the legitimacy of that transfer, retroactive to the time when it should have occurred.

<sup>20</sup> See *First District Court Opinion* at 4-5; Petition at 10-11. According to the record, PSE "combine[d] outbound calling services with its [800] IWATS resale operations, and thus – presumably – can cater more to the overall needs of the small businesses it services." *First District Court Opinion* at 4-5.

<sup>21</sup> See *First District Court Opinion* at 5; AT&T Contract Tariff FCC No. 516 at § 3 (eff. Oct. 20, 1993).

<sup>22</sup> *First District Court Opinion* at 10; see Exhibit H to Petition.

<sup>23</sup> See *First District Court Opinion* at 10; Exhibit H to Petition.

<sup>24</sup> See Exhibit H to Petition.

<sup>25</sup> See *First District Court Opinion* at 10.

Inga Companies to CCI, AT&T also refused to move the traffic from CCI to PSE.<sup>26</sup>

5. The Inga Companies and CCI sued AT&T in the United States District Court for the District of New Jersey in February, 1995, alleging violations of the Communications Act in connection with AT&T's refusal to accept the transfer from the Inga Companies to CCI; and refusal to move traffic from CCI to PSE.<sup>27</sup> On plaintiffs' motion for a writ of peremptory mandamus (preliminary injunction) under 47 U.S.C. § 406 (Mandamus to Compel Furnishing of Facilities), the district court entered a preliminary injunction in May 1995, ordering AT&T to accept the first transfer.<sup>28</sup> To determine whether it should also order AT&T to move the traffic from CCI to PSE, the court requested, under the primary jurisdiction doctrine, that the Commission interpret a certain section of AT&T's tariff.<sup>29</sup> Specifically, the district court referred to the Commission "the issue of the transfer of the aforesaid plans and/or their traffic as between Combined Companies, Inc. and Public Service Enterprises of Pennsylvania, Inc. and its compliance or not with the terms of the governing tariff."<sup>30</sup>

6. Neither party brought the primary jurisdiction question to the agency.<sup>31</sup> Instead, the aggregators went back to the district court.<sup>32</sup> On reconsideration, in a March 5, 1996 decision, the district court made its own substantive finding on the previously referred issue.<sup>33</sup> Notwithstanding its intent to "defer to the FCC on the interpretation of the Tariff provisions governing plaintiffs' proposed transaction," but contemplating a Commission ruling favorable to the aggregators, the court entered a preliminary injunction pending outcome of the Commission determination, and ordered AT&T to "recognize the transfer" of traffic between CCI and PSE and to provide service at the CT 516 rates.<sup>34</sup> AT&T appealed the district court's order to the Third Circuit, which, on May 31, 1996, vacated the lower court's March 5 decision as inconsistent with the primary jurisdiction referral, and reordered the parties to bring the issue to the Commission.<sup>35</sup>

7. On July 15, 1996, the aggregators filed a petition with the Commission in which, "based on established Commission practice, policies, and precedents, the plain language of § 203 of the Communications Act of 1934, as amended, F.C.C. Rule 61.54(j), and Sections 201 and 202 of the Act,"

<sup>26</sup> *First District Court Opinion* at 10. Compare Petition at 13 ("Initially AT&T asserted that CCI was not the 'customer of record' for the Plans (based on what the District Court later determined was AT&T's unlawful refusal to accept the Inga Companies' transfer per the TSAs as determined by the District Court), and, hence, had no authority to order the transfer of the traffic under the Plans to PSE's Contract Tariff 561") with Opposition at 5 ("AT&T objected on the grounds that Section 2.1.8 did not authorize the transfer of a plan unless the transferee, in this case PSE, assumes the original customer's liability and that the location-only transfer violated the 'fraudulent use' provisions of Section 2.2.4 of its tariff because the transfer had both the purpose and the effect of avoiding the payment, in whole or in part, of tariffed shortfall and termination charges." (footnote omitted)).

<sup>27</sup> See generally *First District Court Opinion*; Opposition at 5-6.

<sup>28</sup> *First District Court Opinion* at 1, 21; see *First Preliminary Injunction*.

<sup>29</sup> See *First District Court Opinion* at 15-17.

<sup>30</sup> *First Preliminary Injunction*; see also *First District Court Opinion* at 15 ("whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction").

<sup>31</sup> See *Third Circuit Opinion* at 3-4, 6.

<sup>32</sup> See *Third Circuit Opinion* at 3-4, 6.

<sup>33</sup> See generally *Second District Court Opinion*.

<sup>34</sup> *Second District Court Opinion* at 2 n.2, 16; *Combined Companies, Inc., et al. v. AT&T Corp.*, Civil Action No. 95-908, Preliminary Injunction (filed Mar. 5, 1996) (*Second Preliminary Injunction*).

<sup>35</sup> See *Third Circuit Opinion* at 7-8.

they sought declaratory rulings on four issues.<sup>36</sup> By separate cover motion, the aggregators also sought expedited consideration of their petition for declaratory ruling because, they alleged, AT&T was unlawfully billing certain charges to the aggregators' end-users.<sup>37</sup> AT&T filed Comments in Opposition on August 26, 1996, and Petitioners filed Reply Comments on September 23, 1996.<sup>38</sup> On February 13, 2003, the Bureau released a Public Notice inviting comment on two discrete questions that were not squarely addressed by the parties on the prior record.<sup>39</sup> Specifically, the Bureau first asked the parties to "comment on the nature of the relationship, if any, between AT&T and the end-user customers of AT&T's customers, under AT&T's Tariff FCC No. 2 generally, and specifically under the tariff provisions governing the RVPP and CSTP II Plans at issue in this matter."<sup>40</sup> Second, the Bureau asked the parties to "comment on the remedy that AT&T's Tariff FCC No. 2 specifies that AT&T may exercise if AT&T has reason to believe that its customer is violating section 2.2.4.A.2 of that tariff by '[u]sing or attempting to use WATS with the intent to avoid the payment, either in whole or in part, of any of the Company's tariffed charges by ... [u]sing fraudulent means or devices, tricks, [or] schemes.'"<sup>41</sup> Comments were filed in response to this Public Notice.<sup>42</sup>

### III. DISCUSSION

#### A. Whether AT&T's Tariff Permitted the Movement of End-User Traffic Without The Plans

8. The district court asked "whether section 2.1.8 [of AT&T's Tariff] permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction."<sup>43</sup> Similarly,

<sup>36</sup> See Petition at 7-8.

<sup>37</sup> Joint Motion for Expedited Consideration of the Joint Petition for Declaratory Ruling, Internal File No. CCB/CPD 96-20 (filed July 15, 1996) (Joint Motion for Expedited Consideration).

<sup>38</sup> See Opposition; Joint Reply of Petitioners, CCB/CPD 96-20 (filed Sept. 23, 1996) (Reply).

<sup>39</sup> *Further Comment Requested on the Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, Internal File No. CCB/CPD 96-20, Public Notice, 18 FCC Rcd 1887 (2003) (*Second Public Notice*). The deadline for filing further comments was extended twice. See *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, Internal File No. CCB/CPD 96-20, Order, 18 FCC Rcd 3284 (WCB 2003); *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, Internal File No. CCB/CPD 96-20, Order, 18 FCC Rcd 5713 (WCB 2003).

<sup>40</sup> *Second Public Notice*, 18 FCC Rcd at 1887.

<sup>41</sup> *Second Public Notice*, 18 FCC Rcd at 1887-88.

<sup>42</sup> See Comments of 800 Discounts, Inc., One Stop Financial, Inc., Winback and Conserve Program Inc., Group Discounts, Inc., CCB/CPD 96-20 (filed Apr. 2, 2003); AT&T Further Comments; Comments of Joseph Kearney, CCB/CPD 96-20 (filed Apr. 2, 2003); Comments of Verizon, CCB/CPD 96-20 (filed Mar. 6, 2003); Reply Comments of 800 Discounts, Inc., One Stop Financial, Inc., Winback and Conserve Program Inc., Group Discounts, Inc., CCB/CPD 96-20 (filed Apr. 15, 2003); AT&T Corp. Further Reply Comments, CCB/CPD 96-20 (filed Apr. 15, 2003); see also Letter from Alfonse G. Inga to Marlene Dortch, Secretary, FCC (filed Feb. 28, 2003); Letter from Alfonse G. Inga, President, The Inga Companies, to Judith Nitsche and Secretary, FCC (filed Apr. 23, 2003); Letter from Aryeh Friedman, Senior Attorney, AT&T, to Judith Nitsche, Assistant Division Chief, Pricing Policy Division, FCC (filed Apr. 28, 2003); Letter from Alfonse G. Inga, The Inga Companies, to Judith Nitsche and Secretary, FCC (filed May 5, 2003).

<sup>43</sup> *First District Court Opinion* at 15; see also *Third Circuit Opinion* at 3. Similarly, in its ordering clause, the district court questioned whether the transfer of traffic without the CSTP II Plans "compli[ed] or not with the terms of the governing tariff." *First Preliminary Injunction* at 2.

petitioners' first request for declaratory relief asks the Commission to find that "[a]t the time of the attempted transfer ... in or about January, 1995, by CCI to PSE of the end user traffic under the CSTP II plans held by CCI, neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, nor any other provision of AT&T's Tariff ... prohibited CCI from transferring that traffic without also transferring the CSTP II plans with which that traffic was associated."<sup>44</sup> We conclude that section 2.1.8 of AT&T's tariff did not address or govern CCI's and PSE's request and that its respective tariffs with CCI and PSE permitted the movement of traffic at issue here.

### 1. Section 2.1.8

9. In court and before the Commission, AT&T argues that section 2.1.8 of Tariff No. 2 did not authorize the transfer of traffic without a plan unless the transferee assumed the original customer's liability.<sup>45</sup> In January 1995, when these events occurred, section 2.1.8 of AT&T's Tariff provided that a customer could transfer "WATS" to a "new Customer" only if the new customer confirmed "in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment."<sup>46</sup> AT&T explains that in this context "WATS" means CSTP II plans.<sup>47</sup> We conclude that section 2.1.8 of AT&T's Tariff did not address – and therefore did not preclude or otherwise govern – the movement of

<sup>44</sup> Petition at 7-8. Tracking the language of section 2.1.8, petitioners refer to the requested movement of traffic from CCI to PSE as a "transfer (assignment)." *See, e.g.,* Petition at 7-8 (Requests No. 1, 3). AT&T uses the term "transfer." *See* Opposition. We find that the relocation of end-user traffic from CCI to PSE would simply have been a movement of traffic from one AT&T aggregator to another. We note that the agreement between CCI and PSE expressly provided for the return of accounts to CCI upon request. *See* Exhibit G to Petition. On a separate point, we note that the deposit provision of AT&T's tariff is not implicated here. In their first and third requests, petitioners seek, *inter alia*, declarations that AT&T had no basis to require a deposit to effect the movement of traffic without the associated plans. *See* Petition at 7-8. AT&T, however, does not argue that any deposit was required to effect the movement of traffic from CCI to PSE and notes that the deposit requirement related to the earlier transfer from the Inga Companies to CCI. *See* Opposition at 9 n.8.

<sup>45</sup> *See* Opposition at 5; *see also First District Court Opinion* at 10.

<sup>46</sup> The full text of section 2.1.8 is as follows –

Transfer or Assignment – WATS, including any associated telephone number(s), may be transferred or assigned to a new Customer, provided that:

- A. The Customer of record (former Customer) requests in writing that the Company transfer or assign WATS to the new Customer.
- B. The new Customer notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).
- C. The Company acknowledges the transfer or assignment in writing. The acknowledgement will be made within 15 days of receipt of notification.

The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s). When a transfer or assignment occurs, a Record Change Only Charge applies (*see* Record Change Only, Section 3). Nothing herein or elsewhere in this tariff shall give any Customer, assignee, or transferee any interest or proprietary right in any 800 Service telephone number.

Exhibit I to Petition (AT&T Tariff FCC No. 2, 14<sup>th</sup> rev. p. 20, (eff. Apr. 21, 1994)).

<sup>47</sup> Opposition at 10.

end-user traffic from one aggregator to another, as CCI and PSE sought to effect in this case.<sup>48</sup> Section 2.1.8 concerned the wholesale transfer of “WATS” (which, according to AT&T itself, means “plans”) from one customer to another. As such, its purpose was to maintain intact the balance of obligations and benefits between parties under the tariff when one customer stepped into the shoes of another. Thus, when, in December 1994, the Inga Companies transferred their CSTP II/RVPP plans to CCI, they were required to meet the conditions of section 2.1.8. Here, by contrast, CCI sought to move only the end-user traffic it had aggregated under its CSTP II out of that plan. PSE, in turn, sought to move that traffic into its CT 516. CCI did not seek to transfer the CSTP II/RVPP plans wholesale to PSE. Rather than a single transfer request, here CCI and PSE effectively made two requests: one by CCI to AT&T to decrease its traffic; and another by PSE to AT&T to increase its traffic. CCI and PSE retained the benefits and obligations of their respective agreements with AT&T. We note in this regard that both the forms submitted to AT&T and the agreement between CCI and PSE stated that CCI would continue to subscribe to its existing CSTP II plans.<sup>49</sup> Thus, CCI still would have to meet its tariffed commitments, without the use of the traffic moved to PSE, and AT&T also would remain obligated to CCI under the terms of Tariff No. 2.<sup>50</sup> The moved traffic would be used to meet PSE’s CT 516 volume commitments and, once moved, would no longer be associated with CCI’s CSTP II. If the traffic were moved away from CCI under Tariff 2, to PSE under Contract Tariff 516, AT&T would get less money for the same traffic – the traffic would be discounted 66 percent instead of 28 percent.<sup>51</sup> Implementing the carriers’ request required AT&T only to move traffic – first, out of CCI’s CSTP II, and second, into PSE’s CT 516. As to whether the carriers’ requests were permissible, we note that AT&T’s tariffs with these carriers did not prohibit the addition or subtraction of traffic.<sup>52</sup> Accordingly, in response to the district court’s question, “whether

<sup>48</sup> Ambiguities in a tariff are to be resolved against the carrier and favorably to customers. *The Associated Press Request for Declaratory Ruling*, File TS-11-74, Memorandum Opinion and Order, 72 FCC 2d 760, 764-65, para. 11 (1979) (citing *Commodity News Services, Inc. v. Western Union*, 29 FCC 1208, 1213, para. 3, *aff’d*, 29 FCC 1205 (1960)).

<sup>49</sup> See Exhibits G and H to Petition.

<sup>50</sup> CCI and PSE did agree that the traffic could be returned to CCI upon 30 days written notice from CCI that AT&T required CCI to meet its commitments. See Exhibit G to Petition. Accordingly, at least theoretically, the traffic might have been returned to CCI at some point to enable it to meet any CSTP II obligations. Cf. Reply at 10 (arguing CCI would receive more net income, and thus have more money available to pay any charges, after the traffic was moved to PSE). We do not speculate whether the traffic ever would have been moved back or whether it or some other development would have satisfied CCI’s CSTP II commitments because AT&T did not move the traffic from CCI to PSE.

<sup>51</sup> See *First District Court Opinion* at 5. Exhibit G to the Petition, a letter agreement between CCI and PSE dated January 16, 1995, explains that, once the traffic was moved: (1) CCI’s end-users (formerly the Inga Companies’ end-users) would “be billed by AT&T at the prevailing AT&T Tariff 2 CSTP rates, less twenty three percent (23%) Customer Specific Term Plan (CSTP) discount, and 5.5% Revenue Volume Pricing Plan (RVPP) discount”; (2) CCI would get 80 percent “earned credit” for this traffic from PSE; (3) CCI would continue to be responsible to AT&T for any commitment associated with the CSTP II Plans (which would not be discontinued); and (4) PSE would assist in moving accounts back to CCI upon written notice from CCI that AT&T required CCI to meet its commitments. See Exhibit G to the Petition. Thus, the traffic would be discounted 66 percent instead of 28 percent and the end-users would receive a discount off AT&T’s standard tariffed rates greater than the portion of the 28 percent they had received when their traffic was associated with the CSTP II plan. See *First District Court Opinion* at 3-5. The discount differential would be apportioned between CCI and PSE according to their letter agreement. See also n.66, *infra*.

<sup>52</sup> See generally AT&T Tariff FCC No. 2; AT&T Contract Tariff FCC No. 516. As AT&T concedes, the end-users or “locations,” were CCI’s customers, not AT&T’s. See AT&T Further Comments at 6-10 (citing, *inter alia*, *AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd at 16075, para. 3; *First District Court Opinion* at 3); see also *MCI Telecommunications Corp. v. AT&T*, File No. E-90-28, Order, 7 FCC Rcd 5096, 5100, para. 20 (CCB 1992). Because these end-users did not choose AT&T as their primary interexchange carrier, AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them. See *Hi-Rim Communications, Incorporated v. MCI Telecommunications Corporation*, File No. E-96-14, Memorandum Opinion (continued....)

section 2.1.8 [of AT&T's Tariff] permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction,"<sup>53</sup> we conclude that section 2.1.8 of the tariff did not address or govern the movement of traffic without a plan and that AT&T's respective tariffs with CCI and PSE permitted it.

## 2. The "Fraudulent Use" Provisions

10. Petitioners' first request for declaratory relief goes beyond section 2.1.8 and asks the Commission to find that "[a]t the time of the attempted transfer ... in or about January, 1995, by CCI to PSE of the end user traffic under the CSTP II plans held by CCI, neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, nor any other provision of AT&T's Tariff F.C.C. No. 2, prohibited CCI from transferring that traffic without also transferring the CSTP II plans with which that traffic was associated."<sup>54</sup> Here and before the district court, AT&T argues that the proposed "location-only transfer violated the 'fraudulent use' provisions of Section 2.2.4 of its tariff," thus justifying AT&T's refusal to accept the transfer from CCI to PSE.<sup>55</sup> It claims that the transfer from CCI to PSE "had both the purpose and the effect of avoiding the payment, in whole or in part, of tariffed shortfall ... charges"<sup>56</sup> because CCI's entire revenue stream would transfer to PSE, but PSE would have no corresponding obligation to pay any shortfall charges under the CSTP II.<sup>57</sup> Thus, AT&T argues "if only the traffic on the plans and not the plans themselves were transferred to PSE, *the liability for shortfall . . . charges attendant thereto would then be vested in CCI: an empty shell.*"<sup>58</sup> Further, "[w]ithout the revenue generated by the traffic under the plans, CCI would have no income and no means of backing the responsibilities it maintained after the CCI/PSE transfer of traffic."<sup>59</sup> AT&T claims that, based upon statements made by Alfonse Inga, the owner of the Inga companies, it had reason to believe that CCI's proposed transfer was an attempt to avoid liability for shortfall charges under the Tariff.<sup>60</sup> Accordingly, AT&T argues, it had the right under section 2.2.4 to refuse to accept the transfer to PSE.<sup>61</sup>

11. Based upon our review of AT&T's tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff – which we do not decide – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE. If AT&T had moved the traffic from CCI to PSE, then all of the traffic that CCI had used to meet its CSTP II/RVPP commitments would be associated with PSE's CT 516. Further, CCI (as well as the Inga companies<sup>62</sup>),

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and Order, 13 FCC Rcd 6551, 6559 para. 13 (CCB 1998). Accordingly, AT&T could not refuse to move them out of CCI's CSTP II and into PSE CT 516. The fact that CCI sought to move all of its end-user locations, rather than just one or a few locations, did not confer a right on AT&T where none otherwise existed.

<sup>53</sup> *First District Court Opinion* at 15.

<sup>54</sup> Petition at 7-8 (emphasis added); *see also* n.44, *supra*.

<sup>55</sup> Opposition at 5 (footnote omitted); *see also First District Court Opinion* at 10.

<sup>56</sup> Opposition at 5. Although AT&T also argues that the move also avoided the payment of tariffed *termination* charges, *id.*, it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) is not at issue here. Opposition at 3 n.1. That is consistent with the facts of this matter; petitioners never terminated their plans. Accordingly, termination charges are not at issue in this matter.

<sup>57</sup> Opposition at 5, 12.

<sup>58</sup> *First District Court Opinion* at 10 (emphasis added); *see* Opposition at 12.

<sup>59</sup> *First District Court Opinion* at 10; *see* Opposition at 12.

<sup>60</sup> Opposition at 5, 11-12.

<sup>61</sup> Opposition at 5; AT&T Further Comments at 10-11.

<sup>62</sup> *See First District Court Opinion* at 9.

but not PSE, would continue to have been responsible for any shortfall obligations under the CSTP II/RVPP plans. Once all of its traffic was moved to PSE, CCI might have needed to amass new traffic in order to meet its commitments under its CSTP II plans. AT&T's apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question.

12. Even assuming that AT&T did have reason to believe that the proposed movement of traffic from CCI to PSE violated section 2.2.4 of its tariff, AT&T did not avail itself of the associated remedy that was specified in its tariff. Section 2.2.4, which AT&T cites in support of its argument, was titled "Fraudulent Use" and provided that --

The fraudulent use of, or the intended or attempted fraudulent use of, WATS is prohibited. The following activities constitute fraudulent use:

- A. Using or attempting to use WATS with the intent to avoid the payment, either in whole or in part, of any of the Company's tariffed charges by:

....

- 2. Using fraudulent means or devices, tricks, [or] schemes ....<sup>63</sup>

Section 2.8.2 of the Tariff, titled "Interference, Impairment or Improper Use," however, specified the remedy that AT&T could employ if it suspected fraudulent use under section 2.2.4.<sup>64</sup> That section provided that --

The Company may take immediate action to *temporarily suspend service* when a Customer violation results in any of the following:

....

-- circumvents the Company's ability to charge for its services as specified in Section 2.2.4 (Fraudulent Use) preceding ....

....

In such cases, the Company will make reasonable effort to give the Customer prior notice *before suspending service*.

....

When a violation results in the temporary suspension of service ... [this] restriction[] will be removed when the Customer is in compliance with the [tariffed] regulations and so advises the Company.<sup>65</sup>

<sup>63</sup> See Exhibit 7 to Reply; Attachment 4 to AT&T Further Comments (AT&T Tariff FCC No. 2 at § 2.2.4 (Fraudulent Use), 11<sup>th</sup> rev. p. 21 (eff. July 28, 1994), 5<sup>th</sup> rev. p. 22 (eff. July 28, 1994)); see also Opposition at 5, 9-14; AT&T Further Comments at 10.

<sup>64</sup> For purposes of this discussion, we use the term "fraud" to mean the type of conduct described in AT&T's tariff rather than conduct that would meet a legal definition of fraud.

<sup>65</sup> See AT&T Further Comments at Attachment 5 (AT&T Tariff FCC No. 2 at § 2.8.2 (Interference, Impairment or Improper Use), 6<sup>th</sup> rev. p. 44 (eff. July 28, 1994)) (emphasis added); see also *id.* § 2.8.1 ("General -- The Company may take immediate action to protect its services or interests when certain regulations contained in this tariff are

(continued....)

AT&T, however, did not temporarily suspend service to CCI. Instead, it simply refused, in perpetuity, to move the traffic to PSE.<sup>66</sup> If AT&T suspected fraud, as it claims, it should have suspended CCI's service.<sup>67</sup> It did not do so. AT&T's refusal to move the traffic was not the tariffed remedy for fraudulent use.

13. Because AT&T did not act in accordance with the "fraudulent use" provisions of its tariff, which did not explicitly restrict the movement of end-user locations from one tariff plan to another, AT&T cannot rely on them as authority for its refusal to move the traffic from CCI to PSE. AT&T does not rely upon any other provisions of its tariff to justify its conduct.<sup>68</sup> Accordingly, we grant Petitioners' first request for declaratory relief and find that, at the time CCI attempted to move to PSE the traffic that CCI had been using to satisfy its CSTP II commitments, neither Section 2.1.8 of AT&T's Tariff FCC No. 2, nor any other provision of AT&T's Tariff FCC No. 2, prohibited it from moving that traffic without the

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violated. The specific regulations involved and the action(s) which will be taken by this Company are as specified in 2.8.2, 2.8.3 and 2.8.4 following."). We reject AT&T's argument that these provisions authorized AT&T to "suspend the customer's right to transfer service." See Opposition at 11 n.11 (emphasis added); see also AT&T Further Comments at 11. Pursuant to Rule 61.2, titled "Clear and explicit explanatory statements," as in effect in January 1995, "[i]n order to remove all doubt as to their proper application, all tariff publications must contain clean [sic] and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2 (1994). It is a well settled rule of tariff interpretation that "[t]ariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carrier controls, for the user cannot be charged with knowledge of such intent or with the carrier's canon of construction." *Associated Press Request for a Declaratory Ruling*, 72 FCC 2d at 764-65, para. 11 (quoting *Commodity News Services, Inc. v. Western Union*, 29 FCC at 1213, para. 2). Accordingly, if AT&T intended the term "temporarily suspend service" to mean "permanently suspend the right to move traffic to another Customer" it should have said so. To quote the district court, "Words mean what they say. Rules should not be changed in the middle of the game; and certainly not without notice." *First District Court Opinion* at 21.

<sup>66</sup> This enabled AT&T to continue collecting revenue on the CSTP II traffic aggregated by CCI and at the higher CSTP II rate, rather than the CT 516 rate. Under the billing arrangement between AT&T and petitioners, AT&T billed the end-user directly, calculating into the bill a secondary discount, which the aggregator allotted to the end-user in question. AT&T then paid the aggregator the difference between the aggregator's CSTP II/RVPP discount and the percentage discount allotted to the end-user. The sum remitted by AT&T to the aggregator constituted the aggregator's income, from which it derived its operating costs and profits. *First District Court Opinion* at 4; see also Petition at 10. If AT&T had suspended service as its tariff permitted, it would not have collected any revenue at all under these accounts, rather than, as it did, continue to collect under the CSTP II. Although suspension was clearly a less attractive alternative than continuing to collect revenue at the CSTP II rates, suspension was the only remedy available to AT&T under the terms of its tariff for the type of "fraud" AT&T alleges it suspected.

<sup>67</sup> As discussed in n.65, *supra*, Commission Rule 61.2 requires that tariff provisions be explicit. Rule 61.54(j) further required that "[a] special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate." 47 C.F.R. § 61.54 (1994) (emphasis added). Consistent with these rules, section 2.8 of AT&T's tariff specified the precise remedy to be applied upon the occurrence of different enumerated events. For example, section 2.8.2 provided that when a customer failed to comply with sections 2.2 (Use), 2.7.2.C (Interference and Hazard), 2.7.8.A (Answer Supervision), 2.7.8.D (Customer-provided Communications System Failures), or 2.7.9 (Minimum Protection Criteria), the remedy was to deny requests for additional service and/or temporarily suspend service "on ten days' written notice by certified U.S. Mail to the Customer." See AT&T Further Comments at Attachment 5 (AT&T Tariff FCC No. 2 at § 2.8.2, 6<sup>th</sup> rev. p. 44 (eff. July 28, 1994)). Section 2.8.3 provided for disconnection of service and/or denial of requests for additional WATS in the event of a violation of section 2.5.3, governing nonpayment of charges. See Attachment 5 to AT&T Further Comments (AT&T Tariff FCC No. 2, 4<sup>th</sup> rev. p. 44.1 at § 2.8.3 (eff. Aug. 11, 1994)). Section 2.8.4 permitted AT&T, "immediately and upon written notice to the Customer," to "restrict, suspend or discontinue providing ... service" for violations of section 2.2.3.C or D. *Id.*

<sup>68</sup> See Opposition at 10-14; AT&T Further Comments at 3-5, 10-11.

CSTP II plans.<sup>69</sup>

## B. Whether a Tariff Revision May Have Retroactive Effect

14. In their second request for declaratory relief, petitioners ask the Commission to find that “[u]nder standard tariffing law, principles, policies, and as required by the plain language of Section 203 of the Act, AT&T had no legal basis and could not have effectively tariffed any changes or additions to Section 2.1.8 or any other published provision of its Tariff F.C.C. No. 2, subsequent to January 1995, which could have substantively affected CCI’s right to assign the traffic under its CSTP II plans to PSE in January, 1995.”<sup>70</sup> AT&T does not address the retroactive application of tariff revisions.<sup>71</sup> We also do not understand AT&T to argue that any revisions to its tariff that became effective after January 1995 govern the resolution of this matter. We decline to rule on this request because the issue is moot.

15. The Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to “terminate a controversy or remove uncertainty.”<sup>72</sup> When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission will seek, in exercising its discretion, to resolve issues arising under the Act that are necessary to assist the referring court. Resolution of this issue is not necessary to assist the district court. After AT&T refused to permit petitioners to move the traffic, it filed Transmittal 8179 with the Commission in February 1995, which sought to amend Tariff No. 2. The district court’s May 1995 primary jurisdiction referral to the Commission was based, in part, upon AT&T’s contention that the Commission’s consideration of Transmittal No. 8179 would clarify whether CCI was entitled, under the tariff, to move the traffic without the plans to PSE.<sup>73</sup> According to the record, however, AT&T ultimately withdrew Transmittal 8179 on June 2, 1995.<sup>74</sup> Thus, Transmittal 8179 never became effective.<sup>75</sup> Since AT&T did not amend its tariff, our analysis of petitioners’ retroactivity question would not assist the court in resolving this matter. Nor does either party explain how consideration of this question would resolve a controversy or remove any uncertainty. The issue is moot and, in our discretion, we decline to address it.

<sup>69</sup> See Petition at 7-8.

<sup>70</sup> Petition at 8.

<sup>71</sup> See generally Opposition; AT&T Further Comments.

<sup>72</sup> 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; see also 47 U.S.C. §§ 154(i), (j); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C.Cir.), cert denied, 414 U.S. 914 (1973).

<sup>73</sup> See *First District Court Opinion* at 12, 16-17; *Second District Court Opinion* at 3-4, 13; see also Petition at 14-16 & n.7 (quoting AT&T’s Brief filed in 1995 with the district court (“Transmittal 8179 ... make[s] explicit AT&T’s implicit rights under the tariff. Accordingly, the proceeding in the FCC will resolve that issue ...”). The district court found that *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031 (10<sup>th</sup> Cir. 1993), was persuasive authority on one of the factors relevant to the primary jurisdiction referral: whether a decision by the court prior to an Commission response to a petition pending before that agency might result in conflicting decisions. See *First District Court Opinion* at 14 n.10; see also Petition at 14-15 n.7 (quoting AT&T’s Brief filed in 1995 with the district court). A tariff transmittal, however, is a different kind of administrative filing than the petition for declaratory ruling, see *Mical*, 1 F.3d at 1037, that was at issue in the *Mical* case. As we discuss in Section III.C, below, a tariff transmittal is a carrier-initiated document which, if not withdrawn or deferred by the carrier, or suspended or rejected by the Commission, becomes effective, i.e., modifies the tariff, within a certain number of days from the transmittal filing date. See 47 U.S.C. § 203(a), (b); 47 C.F.R. § 61.58(a), (b). Until the transmittal becomes “effective” it is not part of the tariff. In the interim, the carrier has the power to defer the effective date of a particular transmittal, file an amended version of it, or, as AT&T did in this matter, withdraw it.

<sup>74</sup> *Second District Court Opinion* at 4.

<sup>75</sup> See *Second District Court Opinion* at 4.

**C. Whether AT&T was Authorized to Refuse to Permit the Movement of Traffic From One Reseller to Another**

16. Petitioners' third request for declaratory relief asks the Commission to find that "[s]ince neither Section 2.1.8 of AT&T's FCC Tariff No. 2, nor any other provision of AT&T's duly published tariff prohibited CCI from transferring that traffic without also transferring the CSTP II plans with which that traffic was associated ..., AT&T had no legal basis to refuse to accept the transfer ... of that traffic from CCI to PSE."<sup>76</sup> We agree with petitioners that, because AT&T's tariff did not prohibit the movement of traffic without the plans, AT&T's refusal to move the traffic was unauthorized.

17. In 1995, AT&T, as well as all common carriers of interstate and foreign telecommunications, was required, under section 203 of the Act, to file with the Commission one or more "schedules" of its charges and the classifications, practices, and regulations affecting such charges.<sup>77</sup> With respect to the services at issue in the instant proceeding, this "schedule" was AT&T's Tariff FCC No. 2. Once filed, a tariff is a public document.<sup>78</sup> It defines the terms and conditions upon which a carrier offers and provides services to its customers.<sup>79</sup> Tariffed charges, classifications, regulations or practices may be changed only after notice is given to the Commission and the public.<sup>80</sup> The Commission regulates the substance of tariff provisions and is authorized to suspend or reject the effectiveness of a proposed tariff provision when it believes such provision will violate the Act.<sup>81</sup> When, as here, service is provided pursuant to a filed tariff, the tariff controls the rights and responsibilities of the customer and the carrier, as a matter of law.<sup>82</sup> Thus, the "filed tariff doctrine" requires carriers, as well as their customers, to abide by the terms of the tariff and precludes carriers from acting outside it.<sup>83</sup> As we have discussed above, AT&T's tariff did not prohibit the movement of traffic without CSTP II plans. Assuming that AT&T reasonably suspected "fraudulent use" under section 2.2.4, the remedy under its tariff for the type of fraud it claims it suspected was suspension of service, not refusal to move the traffic. Accordingly, when AT&T availed itself of a remedy not "specified" in its tariff, that action was unauthorized. We grant petitioners' request for declaratory relief that AT&T had no legal basis to refuse to move the traffic from CCI to PSE.

**D. Whether AT&T Violated Sections 201, 202, 203 of the Act and Rule 61.54**

18. In their fourth and final request for declaratory relief, petitioners ask the Commission to find that "AT&T's refusal to accept such transfer of traffic ... was, therefore, in violation of AT&T's tariff, its obligations under Section 201, 202 and 203 of the Act and Rule 61.54 of the Commission's rules."<sup>84</sup> In its Opposition, AT&T argues that "disputed material issues of fact concerning Petitioners'

<sup>76</sup> Petition at 8; *see also supra* n.44.

<sup>77</sup> 47 U.S.C. § 203.

<sup>78</sup> 47 U.S.C. § 203(a).

<sup>79</sup> *See, e.g., Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1170 (9<sup>th</sup> Cir. 2002); *AT&T v. City of New York*, 83 F.3d 549, 552 (2<sup>nd</sup> Cir. 1996)(citing 47 U.S.C. § 203(a)).

<sup>80</sup> 47 U.S.C. § 203(b)(1).

<sup>81</sup> 47 U.S.C. § 204.

<sup>82</sup> *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (cited in *Brown*, 277 F.3d at 1170; *ICOM Holding Inc. v. MCI WorldCom*, 238 F.3d 219, 221 (2<sup>nd</sup> Cir. 2001)).

<sup>83</sup> *See AT&T v. Central Office Telephone*, 524 U.S. 214, 222-23 (1998); *MCI WorldCom v. FCC*, 209 F.3d 760, 762 (D.C. Cir. 2000). The "filed tariff doctrine" has been applied frequently to preclude customers from enforcing alleged carrier promises that are not specified in the tariff. *See, e.g., Central Office Telephone*, 524 U.S. 214; *ICOM*, 238 F.3d at 221-23; *Marco Supply Co. v. AT&T Communications, Inc.*, 875 F.2d 434, 436 (4<sup>th</sup> Cir. 1989).

<sup>84</sup> Petition at 8.

intent to defraud AT&T are at the heart of all four legal issues which CCI is asking the Commission to resolve, and thus preclude a declaratory ruling.”<sup>85</sup> Thus, it reasons, if petitioners wish to proceed before the Commission, they are required to do so through a formal complaint with a complete evidentiary record.<sup>86</sup> We agree that declaratory relief is inappropriate for some of the issues raised by petitioners.<sup>87</sup> We disagree, however, with AT&T’s contention that *all* of the issues upon which petitioners seek declaratory relief – or the court’s primary jurisdiction referral<sup>88</sup> – involve disputed material issues of fact.<sup>89</sup> The language of the tariff is undisputed. It is undisputed that petitioners requested that A&T move end-user traffic from CCI to PSE and it is undisputed that AT&T did not effect that move. These undisputed facts form the basis for our grants of declaratory relief.

19. Within this framework, we consider petitioners’ remaining requests for relief. We go no further than petitioners’ claim under section 203, because we find it dispositive. Petitioners argue that, under the circumstances of this case, AT&T’s refusal to move the end-user traffic from CCI to PSE violated section 203 of the Act.<sup>90</sup> Subsection 203(c) forbids a carrier from employing or enforcing any classifications, regulations, or practices affecting its charges unless they are “specified” in the tariff and makes it unlawful for a carrier to deviate, in the rendition of tariffed services, from the charges, regulations, and practices set out in its filed tariff.<sup>91</sup> We agree that, when AT&T availed itself of a remedy not “specified” under its tariff, it violated section 203 of the Act.<sup>92</sup> As discussed in Section C above, pursuant to section 203, a carrier’s tariff controls the rights and obligations of the carrier, which, as

<sup>85</sup> Opposition at 14; *see also* AT&T Further Reply at 7.

<sup>86</sup> *See* Opposition at 14, 19.

<sup>87</sup> For example, petitioners claim that AT&T engaged in unlawful discrimination in violation of section 202 because its consistent practice was to permit aggregators to transfer locations without plans. *See* Petition at 23, 25. Petitioners also argue that AT&T engaged in an unreasonable practice in violation of section 201 because, when it refused to effect the transfer of locations, it enforced an unwritten rule. *See* Petition at 22-23. Petitioners filed voluminous documents with the Commission, many of which also were filed with the district court, which petitioners claim support their theory of the case. AT&T has not attempted to rebut these individual claims, asserting, instead, that the facts regarding these claims are disputed and arguing that declaratory relief is not appropriate when all relevant facts are not clearly developed before the Commission and essentially undisputed. *See Cascade Utilities, Inc., American Telephone and Telegraph Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 8 FCC Rcd 781, 782 para. 11 (CCB 1993) (cited in Opposition at 10 (additional citations omitted)). As noted above, we agree that declaratory relief is inappropriate when the facts are disputed. Accordingly, we deny all requests not specifically granted. In accordance with the discretion allowed us in a declaratory proceeding, moreover, we see no need to attempt to resolve the disputed issues through a formal complaint proceeding before the Commission, as AT&T proposes. Given our conclusion that AT&T violated section 203 of the Act, it is unclear what additional fact-finding on these issues is necessary. Assuming that further inquiry is appropriate, efficiency favors their resolution in the district court where the evidentiary record already has been developed. That is consistent with petitioners’ original choice of forum for this dispute, with petitioner’s objective in this proceeding, *see* Reply at i (“Any factual issues which need to be addressed in order to apply the tariff, after the tariff is interpreted by the Commission, can be addressed by the District Court, which has already compiled an extensive factual record in this case”), 14, and with the court’s primary jurisdiction referral. The district court proceeding is still pending and the parties have presented evidence in that forum, *inter alia*, in the course of a two-day hearing.

<sup>88</sup> *See* Opposition at 9.

<sup>89</sup> *See* Opposition at 14.

<sup>90</sup> Petition at 22-23, 25-26. Specifically, petitioners argue that AT&T failed to follow its tariff, that it applied and enforced non-tariffed regulations and conditions, and that it failed to tariff the regulations and conditions that it followed. Petitioners argue that this conduct also violates Rule 61.54(j).

<sup>91</sup> 47 U.S.C. § 203(c); *see Central Office Telephone*, 524 U.S. 214.

<sup>92</sup> 47 U.S.C. § 203(c).

a matter of law, is required to abide by the tariffed terms and is precluded from acting outside it.<sup>93</sup> AT&T's tariff did not prohibit the movement of traffic without plans. Thus, when AT&T availed itself of a remedy not "specified" in its tariff, that action violated subsection 203(c). Accordingly, we grant petitioner's request for declaratory ruling that AT&T violated section 203.

20. We do not reach petitioners' remaining claims under sections 201, 202, and Commission Rule 61.54(j) in light of our conclusion that AT&T violated section 203 of the Act.<sup>94</sup> As discussed above, the Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to "terminate a controversy or remove uncertainty."<sup>95</sup> In this case, petitioners' requests for declaratory relief arose out of a primary jurisdiction referral, which asked the Commission to interpret a provision of AT&T's tariff. Our interpretation of the tariff coupled with the undisputed facts lead us to conclude that AT&T engaged in conduct unauthorized by its tariff and, accordingly, violated subsection 203(c) of the Act.

#### IV. CONCLUSION

21. In sum, we conclude that AT&T's tariff did not preclude the movement of end-user traffic from CCI to PSE without the accompanying CSTP II plans. We also conclude that AT&T did not avail itself of the remedy specified in its tariff for suspected fraud and thus cannot rely upon the fraud sections of its tariff to justify its refusal to move the traffic. Accordingly, we conclude that AT&T's action in refusing to move the traffic was unlawful and violated subsection 203(c) of the Communications Act.

<sup>93</sup> See nn.77-83, *supra*, and accompanying text.

<sup>94</sup> See also n.87, *supra*. We also decline to address issues concerning AT&T's shortfall charges in this declaratory proceeding. In the Joint Motion for Expedited Consideration, which was filed on July 15, 1996, petitioners argued that AT&T unlawfully billed shortfall charges to CCI's end users in June of 1996. *Joint Motion for Expedited Consideration of the Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff* F.C.C. No. 2, Internal File No. CCB/CPD 96-20, Public Notice, 11 FCC Rcd 8738 (1996); see also Joint Motion for Expedited Consideration at 2 (citations omitted). After receiving AT&T's bills for shortfall charges, 190 of CCI's end users sent letters to the Commission in June and early July of 1996. The Consumer Protection Branch of the Enforcement Division of the Common Carrier Bureau informed these end users that their letters would be treated as informal comments in this declaratory ruling proceeding. After the original billing, however, in a letter dated June 27, 1996, AT&T informed CCI's end-users that the shortfall charges would be "transferred to a bill directed to CCI itself." AT&T filed a copy of this letter with the Commission in a section 208 formal complaint proceeding that it filed against petitioner Winback & Conserve in October 1996. See Complaint, Exhibit A, Attachment E, *AT&T Corp. v. Winback and Conserve Program, Inc.*, E-97-02 (filed Oct. 25, 1996). Accordingly, we surmise that AT&T made no further attempt to bill or collect these charges from CCI's end-users and therefore conclude that the propriety of imposing shortfall charges on CCI's end-users is a moot issue. See *id.*; see also *AT&T Corp. v. Winback and Conserve Program, Inc.*, 16 FCC Rcd at 16076-77, para. 8. With respect to petitioners' argument that AT&T's CSTP II shortfall charges set forth in Tariff No. 2 are facially unreasonable, we find this issue – which was not referred to us by the district court – to be irrelevant to our conclusion that AT&T violated its tariff. See Section B, *supra*; see also n.50, *supra*. Finally, we refuse the parties' request that we declare whether "pre-June 17, 1994 CSTP II plans, as are involved here, may never have shortfall charges imposed, as long as the plans are restructured prior to each one-year anniversary." See Joint Motion for Expedited Consideration at 2; Opposition at 14-15; Reply at 25. Declaratory relief on this issue – which also was not referred to us by the district court – is inappropriate because whether CCI's plans were pre- or post-June 17, 1994 plans is a disputed fact. Compare *id.* with Opposition at 14 n.13.

<sup>95</sup> 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; see also 47 U.S.C. §§ 154(i), (j).

**V. ORDERING CLAUSES**

22. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 202, and 203 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201, 202, 203, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Joint Petition for Declaratory Ruling of Combined Companies, Inc. and Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc. IS GRANTED to the extent set forth herein, and is otherwise DENIED.

23. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201, 202, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Joint Motion for Expedited Consideration of the Joint Petition for Declaratory Ruling IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary



**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued November 12, 2004

Decided January 14, 2005

No. 03-1431

AT&T CORPORATION,  
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA,  
RESPONDENTS

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On Petition for Review of an Order of the  
Federal Communications Commission

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*David W. Carpenter* argued the cause for petitioner. With him on the briefs were *Peter H. Jacoby*, *James F. Bendernagel, Jr.*, *C. John Buresh*, and *Michael J. Hunseder*.

*Laurence N. Bourne*, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the briefs were *Robert B. Nicholson* and *Steven J. Mintz*, Attorneys, U.S. Department of Justice, *John A. Rogovin*, General Counsel, *Richard K. Welch*, Associate General Counsel, *John E. Ingle*, Deputy Associate General Counsel, and *Rodger D. Citron*, Counsel. *Laurel R. Bergold*, Counsel, entered an appearance.

Before: GINSBURG, *Chief Judge*, and TATEL and ROBERTS, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROBERTS.

ROBERTS, *Circuit Judge*: AT&T Corporation petitions for review of a Federal Communications Commission order interpreting AT&T's tariff on resales of 800 telephone service. A provision of that tariff allows resellers to transfer their business, so long as the recipient assumes all of the transferor's obligations. Based on this provision, AT&T denied one reseller's request to move the "traffic" under its 800 plans to another reseller without a transfer of the corresponding obligations. The Commission interpreted the tariff transfer provision as not addressing the movement of traffic, and ultimately held that AT&T could not refuse the transfer. We conclude that traffic is a type of service covered by the transfer provision, and that the Commission's contrary interpretation would render the provision meaningless. We grant the petition for review.

## I.

This case concerns the transfer of toll-free 800 telephone service. At the time of the events in question, AT&T was the dominant carrier of such service, which it provided pursuant to tariffs filed with the FCC. Under the Communications Act of 1934, as amended, and the "filed rate doctrine" incorporated therein, neither the carrier nor its customers could depart from the terms set forth in AT&T's tariffs. *See* 47 U.S.C. § 203(c); *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 221–24 (1998); *Orloff v. FCC*, 352 F.3d 415, 418 (D.C. Cir. 2003).

The tariff at issue here — AT&T Tariff FCC No. 2 — allowed companies to purchase and resell 800 service to small businesses around the country. The tariff refers to this resale business, as well as the underlying service itself, as Wide Area Telecommunications Service (WATS). Any company could

qualify as a reseller so long as it met the requirements of one of several plans described in the tariff. Companies qualified by aggregating the WATS usage of multiple small businesses into a single plan, and, under the tariff, the companies obtained AT&T's service for these "end-user" businesses at a discounted rate. In return, the reseller or "aggregator" company agreed to meet certain obligations set forth by the carrier, including commitments to purchase a certain volume of use.

In the early 1990s, as other carriers began to acquire a share of the 800 market, the FCC began to loosen its regulation of AT&T. Starting in 1991, the Commission no longer forced the carrier to offer WATS only through the generic plans set forth in Tariff No. 2. Instead, the FCC gave AT&T the option of individually negotiating "contract tariffs" with particular resale companies. As contract tariffs could be drawn to offer discounts greater than those available under Tariff No. 2, many resellers naturally sought to obtain them.

Alfonse Inga, a New Jersey businessman who owned several aggregator companies, was one such reseller. In 1994, Mr. Inga undertook a series of transactions designed to move his business from Tariff No. 2 to a more lucrative contract tariff. First, his companies — each of which operated under CSTP II, a type of plan offered under Tariff No. 2 — transferred all nine of their plans to a new entity, Combined Companies, Incorporated (CCI). As required by Section 2.1.8 of Tariff No. 2, CCI expressly agreed to assume all obligations of the transferor companies. The transfer also stipulated that CCI would pass 80 percent of its profits on to the transferor companies. Second, CCI attempted to negotiate a contract tariff with AT&T. Third, as temporary cover until this envisioned contract tariff became a reality, or as a permanent alternative in case it never did, Mr. Inga planned another transfer — one between CCI and Public Services Enterprises of Pennsylvania (PSE). PSE already had a contract

tariff with AT&T at a substantially larger discount on AT&T's 800 service than that available to CCI under Tariff No. 2.

AT&T resisted this series of transactions. Fearing that CCI would not have the assets to meet its obligations under the transferred plans, AT&T initially refused to implement the first transfer (from the Inga companies to CCI) unless CCI paid a deposit — a requirement not found in Section 2.1.8 of Tariff No. 2. In 1995, the Inga companies and CCI brought suit against AT&T in federal district court in New Jersey, and the court ordered AT&T to drop the deposit requirement and implement the transfer. *Combined Companies, Inc. v. AT&T*, No. 95-908 (D.N.J. May 19, 1995) (unpublished opinion).

Meanwhile, CCI's negotiations for its own contract tariff failed and CCI entered into the second transfer, moving substantially all the 800 service in its CSTP II plans to PSE. As with the first transfer, the CCI-PSE agreement called for PSE to pass much of the realized profit back to CCI. The second transfer, however, differed from the first in an important respect. The parties attempted to structure the transaction to avoid Section 2.1.8 of Tariff No. 2, so that PSE would not have to assume CCI's obligations on the transferred service. To do this, the parties asked AT&T to move just the service to particular end-user businesses — the "traffic" under CCI's plans — and to leave the plans themselves otherwise intact. The parties hoped that, as a result, 800 service would be billed under PSE's substantially lower contract tariff rates, while CCI would remain responsible for the obligations to the carrier under Tariff No. 2.

AT&T balked at this second transfer as well. AT&T maintained that Section 2.1.8 applied to the transaction, and that PSE thus had to assume CCI's obligations in order for the transfer to go through. In addition, AT&T argued that the proposed transfer violated the tariff's "fraudulent use" provisions, as CCI almost certainly would fall short of its volume

commitments once the traffic was moved to PSE's account, and AT&T had reason to believe that CCI would not have sufficient assets to pay the resulting penalties.

The same district court that compelled AT&T to accept the first transfer declined to rule on the second, holding that tariff interpretation issues were within the primary jurisdiction of the FCC. *Id.* at \*15. When none of the parties brought the primary jurisdiction matter to the agency, however, the district court went ahead and issued its own decision interpreting the tariff. *See Combined Companies, Inc. v. AT&T*, No. 95-908 (D.N.J. Mar. 5, 1996) (unpublished opinion). The Third Circuit vacated this ruling as inconsistent with the primary jurisdiction referral, and ordered the sides to bring the matter to the FCC's attention. *Combined Companies, Inc. v. AT&T*, No. 96-5185 (3d Cir. May 31, 1996) (unpublished opinion).

The specific question referred to the FCC was "whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction." *Id.* at \*3. While the case was pending before the Commission, AT&T entered into a settlement with CCI, extinguishing its WATS plans and releasing all claims between the two parties. Apparently as a result of this settlement, the Commission took no action on the case for seven years. The Inga companies, however, continued to claim damages stemming from AT&T's denial of the CCI-PSE transfer, and in 2003 the Commission finally addressed the Third Circuit referral.

The Commission held that Section 2.1.8 did not govern, and therefore did not preclude, the movement of traffic without attendant obligations. FCC Memorandum Opinion and Order at 6-8. In particular, the Commission reasoned that Section 2.1.8 applied only to the transfer of entire tariffed plans, and not to the transfer of just the traffic component of such plans. *Id.* at 7. The Commission also held that, even assuming the transaction

constituted fraud under the tariff, the tariff did not allow AT&T to remedy such fraud by denying the transfer. *Id.* at 8–10. In light of these holdings, the Commission ruled that AT&T could not refuse the CCI-PSE transfer. *Id.* at 14. The Inga companies, whose involvement in the federal district court action in New Jersey is still ongoing, view the Commission’s ruling as entitling them to millions of dollars in damages.

AT&T now petitions for review of the FCC order.

## II.

Our inquiry is governed by the Administrative Procedure Act, which requires us to uphold an FCC order unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). To clear this threshold, the FCC’s tariff interpretations must be “reasonable [and] based upon factors within the Commission’s expertise.” *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 258 (D.C. Cir. 2001) (citation omitted and alteration in original). Thus, we will reverse the FCC only if its interpretations are “not supported by substantial evidence, or the [Commission] has made a clear error in judgment.” *Id.* (same).

The Commission’s order in this case is entirely predicated on its determination that Section 2.1.8 of Tariff No. 2 does not apply to the movement of traffic. At the time of the proposed transfer to PSE, that Section read as follows:

Transfer or Assignment — WATS [Wide Area Telecommunications Service] . . . may be transferred or assigned to a new Customer, provided that:

. . .

B. The new Customer notifies [AT&T] in writing that it agrees to assume all obligations of the former Customer at the time of the transfer or assignment.

The Section on its face does not differentiate between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS — the telephone service itself. The new and former Customers referred to are the aggregators, in this case PSE and CCI. Accordingly, any transfer of WATS required PSE to assume CCI's obligations.

AT&T's basic argument before this court is that "traffic," even if it is not the same thing as a tariffed *plan*, is a type of Wide Area Telecommunications *Service* covered by Section 2.1.8. In transferring traffic, the parties sought to reassign particular end-user businesses from CCI to PSE, so that calls to these businesses would be billed under PSE's lower rates. Thus, CCI asked AT&T to transfer the billed telephone numbers (corresponding to individual end-user locations) included in each CSTP II plan. *See* Transfer of Service Agreement Forms. It must be — AT&T argues — that what the parties sought to transfer is a type of service covered by the tariff; that is why they used the Transfer of *Service* forms. *See* AT&T Tariff FCC No. 2, Section 3.1.1 (defining "800 Service and WATS" as "telecommunications services which permit inward and outward calling respectively between a station associated with an access line in one location and stations in diverse geographical service areas specified by the Customer").

The Commission does not respond directly to AT&T's argument. Instead, both in its brief before this court and in its order below, the FCC relies on a statement made by AT&T in comments submitted in the administrative proceeding. There, AT&T noted in passing that "in this case the relevant WATS services are the CSTP II Plans." Comments of AT&T Corp. in Opposition to Joint Petition for Declaratory Ruling and Joint Motion for Expedited Consideration at 10. The Commission interprets this statement as conceding that Section 2.1.8 can only be triggered by the wholesale transfer of tariffed plans, and not